

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI

In re)	
)	Case No. 10-41902
US FIDELIS, INC.,)	Chapter 11
)	
Debtor.)	

**MEMORANDUM IN SUPPORT OF JOINDER IN MOTION FOR THE ENTRY OF AN
ORDER PURSUANT TO 11 U.S.C. § 1104(a) DIRECTING THE APPOINTMENT OF A
TRUSTEE**

The State of Washington and the State of Ohio on their own behalf and on behalf of the States of Iowa, North Dakota, Arkansas, Oregon, Maryland, Wisconsin, North Carolina, West Virginia and Tennessee (referred to as “the States”) now join the State of Missouri in its motion to appoint an independent trustee in the Chapter 11 case of U.S. Fidelis. 11 U.S.C. § 1104(a) provides for the appointment of a trustee upon “for cause” or “if such appointment is in the interests of creditors. . . .” 11 U.S.C. § 1104(a)(1), (2). The States contend that cause exists to appoint a trustee and is in the best interest of creditors.

As noted by the State of Missouri, Darian and Cory Atkinson stripped U.S. Fidelis of corporate assets for their own personal gain. They did this at the expense of over 400,000 consumers who purchased contracts by virtue of U.S. Fidelis’ deceptive marketing practices. These consumers are creditors in this bankruptcy and their voices and interests deserve to be heard.

The State of Washington and eighteen other states (“the States”) initiated a multi-state investigation of U.S. Fidelis in March of 2008¹ in response to complaints of deceptive marketing by U.S. Fidelis under the business names of National Auto Warranty Services and Dealer

¹ The states participating in the investigation was later expanded to include approximately 40 interested states.

Services. The States' investigation disclosed a profound pattern and practice of deception by U.S. Fidelis and its corporate owners. Patterns of deception were discovered in U.S. Fidelis' advertising, its illegal robo-dialing, its telemarketing sale representations and its consumer refund practices.

Beginning in 2006 and 2007, U.S. Fidelis introduced itself to consumers by sending 63.8 million mailers telling consumers that "Dealer Services" could "extend the factory warranty coverage on your vehicle." Declaration of Mary C. Lobdell in Support of Joinder Motion to Appoint Trustee, Ex D (NAWS 10103140) ("Lobdell Decl."). It announced that it "just introduced a new affordable extended warranty program" that provided "bumper to bumper coverage" for a "guaranteed lowest price." *Id.*, Ex. D, I. Unfortunately for consumers, all these representations were lies.

Only a vehicle manufacturer can provide an extended warranty. Under the federal Magnuson-Moss Warranty Act, a warranty by definition is provided by the original supplier of a consumer and only at the time the product is sold. 15 U.S.C. § 2301(6); 16 C.F.R. § 700.11 (2009). What U.S. Fidelis was selling, on the other hand, was a service contract. A service contract is offered by a company, not the original supplier of the product, and obligates the company to pay for the costs of repairs as defined in a contract. 16 C.F.R. § 700.11 (2009); *Tang v. C.A.R.S. Protection Plus, Inc.*, 301 Wis. 2d 752, 758, 734 N.W. 2d 169, 171 (2007). Service contracts are apples and vehicle warranties are oranges.

Calling its product an "extended warranty," however, was an effective ruse by U.S. Fidelis. It confused consumers and drew upon the consumers' knowledge of bumper to bumper coverage offered by vehicle manufacturers. U.S. Fidelis reinforced this deception by telling consumers that the offers were provided on behalf of specific manufacturers. Lobdell Decl., Ex.

D. In a mailer to Washington consumers, for example, it falsely stated that it was offering “a special GM owner extended warranty program.” It made similar representations on behalf of BMW and Subaru manufacturers who sued U.S. Fidelis for deceptive advertising, trademark infringement and unfair practices. Lobdell Decl., Ex. E (*BMW of North Am., LLC, et.al. v. US Fidelis, Inc.*, Case 2:09-03607 (Dist. N.J. July 22, 2009) and *Fuji Heavy Industries, Ltd et.al v. National Auto Warranty Services, Inc.*, Case No. 2:09-cv-00070 (Dist. N.J. January 7, 2009).

Consumer complaints also confirmed that many consumers were deceived by such tactics. As noted by a consumer from North Carolina in a letter to U.S. Fidelis seeking to cancel his contract, “[i]t was my understanding that I was buying a policy from General Motors. This turns out not to be true.” *Id.*, Ex. H (NAWS 10100426).

U.S. Fidelis used other deceptive practices to drive consumers to its doors, including automatic dialers that generated robo-calls. These calls violated numerous federal and state laws.² Lobdell Decl., Ex. F (*Federal Trade Commission v. Voice Touch, et. al*, Docket No. 09-cv-2929 (N. Dist. Ill. 2009) (Declaration of Roberto C. Menjivar Pursuant to 28 U.S.C. § 1746)). Between March 2007 and January 2008, U.S. Fidelis paid a robo-dialer, Voice Touch, \$6 million to make one billion dials to landlines, cell phone lines and business lines throughout the United States. *Id.*, Ex. F (Menjivar Decl., at 6, 16-17, 18-19). Part of Voice Touch’s practices included the sequential dialing of “a block of telephone phone numbers associated with a particular code and prefix and then disseminat[ing] its prerecorded messages to every number in that area code

² E.g. 47 U.S.C. § 227(b)(1)(A) (unlawful to make any call, absent emergency purposes or prior express consent, using an automatic telephone dialing system); 47 U.S.C. § 227(b)(1)(B)(unlawful to use artificial or prerecorded voice to deliver a message without prior consent using an automatic dialing system); 47 U.S.C. § 227(b)(1)(A)(iii) (unlawful to make any call to a cell phone using automatic dialing system); 15 U.S.C. § 6101 *et. seq.* (telemarketing violations); 16 C.F.R. § 310.4(a)(7) (unlawful to spoof a phone number); 16 C.F.R. § 310.4(b)(1) (repeat phone calls, denying or interfering with placement on do not call, calling consumer after no additional call requests, and abandoned phone calls unlawful); NCGS § 75-102 (North Carolina do not call laws); NCGS § 75-104 (North Carolina automatic dialing devices generally prohibited); 815 ILCS 305/1 *et. seq.* (Illinois automatic dialing laws); RCW 80.36.400 (Washington automatic dialing prohibited).

and prefix.” *Id.* This resulted in calls to hospitals, emergency services, do not call, cell phone and business phone numbers.

In addition to Voice Touch, U.S. Fidelis engaged Voice Solutions and Havenlink to conduct telemarketing campaigns for it through July of 2008. *Id.*, Ex. E. According to a lawsuit filed by Verizon Wireless, Voice Solutions made three million illegal calls to Verizon Wireless customers on behalf of U.S. Fidelis over a seven month period in 2008. *Id.*, Ex. E (*Cellco Partnership dba Verizon Wireless v. Explicit Media, Inc., dba “Voice Solutions,” National Auto Warranty Services, Inc.*, Case: 3:08-cv-03581 (Dist. N.J. 2008)). U.S. Fidelis not only engaged others in the illegal robo-calling, but drafted the scripts that it blasted nationwide. *Id.*, Ex. F (Menjivar Decl. at 19.). Notably, U.S. Fidelis continued to engage in illegal robo-dialing even while it was the subject of a multi-state investigation. *Compare* Lobdell Decl. at 1 *with* Ex. E (Verizon Complaint).

Although deceptive advertising and dialing provided the means of driving consumers to U.S. Fidelis, it continued to deceive consumers through telemarketing sales. U.S. Fidelis sold two products. One product was a vehicle service contract that purported to cover repairs to most major vehicle parts and included a full or prorated refund over the life of the contract. *Id.*, Ex. B. The other product sold by U.S. Fidelis was a “vehicle protection product additive” that warranted only “lubricated parts of the engine and/or transmission” and offered no refund after 30 days or after use of the additive. *Id.*, Ex. G (Carmor Product Warranty).

Based upon consumer complaints, U.S. Fidelis materially misrepresented both these products to consumers. *Id.*, Ex. H. Many consumers who purchased vehicle service contracts believed and were told that they were purchasing “bumper to bumper” coverage for their vehicle. One graphic example is a consumer complaint from the Montgomery County Office of

Consumer Protection. After Montgomery County reviewed the audio tape of the transaction, it discovered that the consumer was told, like many consumers, that all automobile repairs would be covered, except maintenance and general wear and tear. *Id.* No exclusions were discussed nor the different levels of coverage under different vehicle service contracts. *Id.* The consumer thought she was purchasing what was represented as “bumper to bumper” coverage when in fact she did not. *Id.*

Vehicle protection products generated further consumer complaints. To make a sale, U.S. Fidelis would often sell a vehicle protection product to a consumer who believed they were purchasing a vehicle service contract instead. *Id.*, Ex. G. Material terms of the product warranty were not disclosed. Consumers were never told (a) that the product was not a service contract; (b) that the product warranty will only cover \$3,000 of the engine repair, \$2,000 of the transmission repair and \$1,500 for transfer case repair; (c) that the consumer must pay and will not be reimbursed for the engine tear down to diagnose any problem; (d) that if the part is covered, coverage is limited to the National Auto Dealers Association trade-in value; (e) that the contract cannot be canceled or can only be canceled within 30 days of purchase; and (f) that if the contract is canceled within 30 days, no refund will be given if the consumer uses the product or fails to return the product. *Id.*, Exhibit G.

Another common complaint by consumers related to deceptive refund practices. In thousands of pages of complaints, consumers protested that the Debtor obstructed refund requests and miscalculated refunds. Consumers complained that U.S. Fidelis obstructed refunds by putting consumers on hold or repeatedly transferring their call so that the consumer would give up. *Id.*, Exhibit C. In some instances, consumers were told that they were not entitled to a refund or were given misinformation on how to obtain a refund. *Id.* Even if the consumer sent

the proper paperwork to U.S. Fidelis, the refund was often denied for any number of technical reasons, including that the information was faxed. If a consumer managed to obtain a refund, U.S. Fidelis often miscalculated the amount or charged the consumer an unauthorized fee. *Id.*, Ex. A.

Vehicle service contract refunds are governed by both state law and the automobile service contract purchased by the consumer. Automobile service contracts sold by U.S. Fidelis provided for a common refund scheme that allowed for a full refund of all amounts paid by the consumer during the first 30 to 60 days of the contract and a prorated amount based upon time or mileage after that time.³ *See id.*, Ex. B. The contracts further provided for certain administrative fees if the refund request was made by the consumer more than the first 30 to 60 days after the contract was sold. A typical refund provision reads as follows:

If this **Contract** is cancelled within the first sixty (60) days and no claims have been filed, we will refund the entire **Contract** charge paid. If this **Contract** is cancelled after the first sixty (60) days or a claim has been filed, we will refund an amount of the **Contract** charge according to the pro-rata method reflecting the greater of the days in force or the miles driven based on the term/miles selected and the date **Coverage** begins, less a twenty-five (\$25.00) dollar administrative fee. In the event of cancellation, the lienholder, if any, will be named on a cancellation refund check as their interest may appear. Where permitted, the total amount of all authorized claims will be deducted from all refunds.

Id., Ex. B (NAWS10106623). U.S. Fidelis, however, created phantom fees to reduce a consumer's refund.

The case of a senior citizen exemplifies the deception committed by U.S. Fidelis against numerous consumers. *Id.* Ex. A (NAWS 101000436-438). This senior purchased a service contract and paid in full for the contract at the time of purchase. *Id.* After his death, his widow canceled the service contract and requested a refund. *Id.* According to USF records, the service

³ Some state laws allow for a shorter refund period and would govern over the contract terms.

contract was canceled 71 days after it was purchased. *Id.* Only after complaining to the state attorney general did U.S. Fidelis provide a partial refund and then improperly charged a \$1,035 cancellation fee, a fee not authorized by contract or law.

This practice was not an isolated incident. Improper and unauthorized cancellation fees were imposed on numerous consumers. E.g., *id.*, Ex. A (NAWS 10101551-1554 (\$332.17 NAWS fee); 10101591 (\$250.00 NAWS fee); 10101607 (\$883.32 Warranty Co cancellation fee); 10101650 (\$50.00 NAWS fee); 10101652-1653 (\$259.35 NAWS fee); 10101654-1656 (\$75.95 NAWS fee); 10101657-1658 (\$250.00 Mepco fee, \$335.48 NAWS fee); 10101659 (Mepco Fee \$150.00, NAWS fee 78.96); 10101669-1670 (\$256.20 NAWS fee); 10101671-1672 (\$966.80 NAWS fee); 10101685-1686 (\$104.72 NAWS fee); 10101715-16 (\$182.18 NAWS fee); 10101717 (\$50.00 selling agent fee); 10101741 (\$113.32 NAWS fee); 10101742 (\$206.96 NAWS fee); 10101750 (\$219.56 NAWS fee); 10101751 (\$100.00 NAWS fee); 10101752 (\$100.00 NAWS fee); 10101754 (\$115.04 NAWS fee)).

The deceptive practices conducted by the Debtor are well documented in litigation and consumers complaints. The Debtor systematically conducted a campaign to deceptively induce the purchase of vehicle service contracts to the detriment of hundreds of thousands of consumers nationwide. These practices should not go unnoticed nor should it be “business as usual” for this Debtor.

This case cries out for the appointment of an independent trustee. Although the Debtor is no longer selling service contracts, the corporate owners have not resigned and they retain legal control over this Debtor. Given past business practices, the States have no confidence that the Atkinsons will keep the Debtor at arms length. The Debtor and its various managers also have not acted in a manner to protect the interests of consumers. On information and belief, none of

the Debtor's managers established significant reserves to pay consumer refunds. It appears that Mepco has been the sole beneficiary of any reserves created in the last six months.

The interests of consumers are best served by the appointment of an independent trustee. The Debtor has squandered corporate assets, demonstrated a lack of evenhandedness and fair dealing toward consumers, and conducted extensive consumer fraud. Thus, the States respectfully requests that this Court appoint a Chapter 11 Trustee.

DATED this 14th day of April, 2010.

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